IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Reply Brief of Amicus Curiae Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Respondent

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I

The Government Did Not Concede That Any of the Works Had "Redeeming Social Importance"

Petitioners in their reply brief state:

> "The United States does not now dispute petitioners' showing that each of the publications at issue has redeeming social importance, and declines to defend the conclusions of the courts below that these publications have no value for society . . . "

We do not understand the respondent's position to be sussuscept of such a construction. There is no concession by the U. S. Government that any of the works have *redeeming social importance.*

The government's position,[1] simply stated, is that a work may have social importance by itself, and yet have "no value" (1) when used as a part of a larger whole, which is designed for a different purpose from that from which the "part" acquired its value, or (2) when used as a whole, but for a different purpose from that for which it had value.

In the view of amicus, that portion of Judge Body's opinion which discussed the obscenity of "Eros, Vol. 1, No. 4, 1962" correctly and adequately sets forth the first proposition and hardly requires elaboration. However, this theorem can, perhaps, be more effectively demonstrated by a more isolated example. Suppose the etching on page 11 of Eros, depicting the biblical story of the incestuous act committed by Ammon on his sister Tamar, to be incorporated into and made an illustrated part of the cheap paperback book "Strange Bondage," (W-18)[2] published by Foremost Publishers, 65 Cadillac Square, Detroit, Michigan, and distributed nationally by World Wide News Company of Cleveland, Ohio. Certainly the art value of such an etching in an art gallery to a sophisticated art audience cannot be transferred so that it constitutes "value" to save a paperback which is designed for a different purpose, i.e.,

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[1] Also the position of amicus and the trial and appellate courts. The trial and appellate courts did not find it necessary to discuss the second proposition, having agreed that the Housewife's Handbook on Selective Promiscuity was not a bona fide case history.

[2] "Strange Bondage" opens with an incestuous scene between brother and sister which is interrupted by an unexpected return of the parents. Thereafter brother and sister go their separate ways through sex orgy after sex orgy until they return to each others embrace in the final chapter to complete their act of incest.

whose predominant appeal is to prurient interest. If anything, it has a *negative value,* because under the circumstances it contributes, though in the smallest degree, to the predominantly prurient appeal of the paperback text.

The mere fact that Eros contains a number of such etchings, or the like, would not take it out of the "de minimis exclusion" which Petitioners are willing to admit to.[3] Far from it. Each etching contributes a pictorial representation which lends itself to and reinforces the predominant prurient theme. Judge Body explained this in his opinion, where he said concerning other portions of Eros:[4]

> "This does not mean that the articles have no effect upon the finding of obscenity with regard to the periodical as a whole. Here is a pattern. Here is a craftily compiled overall effect . . . "

The second theorem acknowledges that a work may have social importance under a special set of circumstances, but "no value" when used for a different purpose from that for which it had value. Were the Housewife's Handbook a true case history it might be said to have value for a limited audience of professional people who have a legitimate interest in such case histories. As noted in footnote 1 however, the trial[5] and appellate courts did not consider this aspect, having rejected the factual premise upon which petitioners' defense is based, i.e., that the book was an authentic case history. The government does not "seek(s) to sustain conviction on the Handbook counts by adding a

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[3] Petitioners' Reply Brief page 2, footnote 1.

[4] United States v. Ralph Ginzburg et al, 224 F. Supp. 129, 134.

[5] It bears emphasis that the trial court disbelieved the "accuracy of this book" and found it constituted "bizarre exaggeration." The author testified before Judge Body and, as a trier of fact, the trial judge had every right to pass on the matter of her credibility.

new qualification" as claimed by Petitioners.[6] On the contrary, before the government is forced to reply to that theorem, this Court must first reject the above fact findings of the trial judge, a hurdle in Petitioners' path not easily overcome.[7]

Assuming that the state of the argument does place the government in a position where it is necessary to reply, as were this Court to reject the trial judge's factual determination as to the nature of the book, still the Petitioners are not able to avail themselves of the defense. 18 USCA 1461 is a criminal statute calling for the government to prove that the defendant has knowingly mailed subject matter, the predominant appeal of which is to the prurient interest of an average person of normal sexual impulses.[8] All that the government need prove is that the defendant by his conduct abused a conditional privilege.[9] A special audience is a matter of defense in the nature of justification, which the defendant failed to place in issue at the trial. Similarly the matter of a special audience is a part of the government's case in chief, where the people wish to rely

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[6] Petitioners' Reply Brief, page 4.

[7] Amicus submits that the 24 page book outline of the Handbook, in the appendix of its amicus brief, is autoptical proof in capsule form in support of the trial judge's findings that he disbelieved the "accuracy" and found it constituted "bizarre exaggeration" and hard-core pornography. A central theme arrived at through an outlining process should be of as much assistance to this Court as Petitioners' conclusionary argument that: "As a true account of the author's sexual experiences and attitudes, it provides information and develops insights which should not be the exclusive possession of the psychiatrist . . ." (See Petitioners' Reply Brief, page 5)

[8] *Grove Press Inc.* v. *Christenberry,* DCNY 1959, 175 F. Supp. 488, 499.

[9] *U. S.* v. *Rebhuhn,* 109 F. 2 512, 514, cert. denied 60 S. Ct. 976, 84 L. Ed. 1399, 310 U.S. 629.

on a test other than the "Roth" average person test. *U. S. v. Levine*, 83 F. 2 156, 158.

The *Roth* (*supra*), *Levine* (*supra*) and *Rebhuhn* (*supra*) cases are authorities against the Petitioners' statement[10] that 18 U.S.C. 1461 is not a statute which makes the redeeming importance of a work turn upon the professional or educational level of its audience. See also amicus brief at pp. 68-72, discussing the variable nature of obscenity. Social importance is not determined in a vacuum.

II

The Concept of "Obscenity" Under 18 USC 1461 Includes the Sexually "Vulgar and Filthy"

Petitioners' reply that the concept of obscenity under 18 U.S.C. Section 1461 does not include the sexually "vulgar and filthy" as asserted by the government in its brief (Res. Br. 14, 29-30) is not supported by their authority, *Swearingen* v. *U. S. Swearingen* simply held that the language specifically set forth in the footnote of that case, which the court termed "exceedingly coarse and vulgar", did not have in it the lewd, lascivious and obscene tendency and the sexual impurity proscribed by the statute. There is no similarity between the Swearingen language noted in the footnote and that which is involved in this case.

The Court in *Swearingen* noted at page 451 that the word "obscene" had the same meaning as that term used in "obscene libel" in the Common Law. In *Roth* at footnote 20 this Court noted:

> "We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I. Model Penal Code . . . "

Since the word "obscene" as used in Section 1461 has the same meaning as the word "obscene" as used in the Com-

[10] Petitioners' Reply Brief, page 4.

mon Law Cases, and since the Common Law definition of "obscene" is the same as that stated in the A.L.I. Model Penal Code, then it would appear that the government is correct in its assertion. See, in particular, Respondent's Brief, page 15, footnote 3.

III

Constitutional Review Is Limited to the Determination Whether the Social Importance of the Conduct or Subject Matter Is Sufficient to Take the Case Out of the Realm of a Jury Issue

The Petitioners' Reply Brief takes issue with the alternative suggested by the government in its brief as to the manner of this Court's review:

> "While we thus acknowledge that it would not be inappropriate in this case, in light of the ultimate constitutional nature of the issues of characterization involved, for the Court to undertake an independent evaluation of each of the factors under the Roth test as to each of the publications in issue, we note alternatively that the Court could limit its plenary review of the materials to the question of their redeeming importance, leaving the questions of pruriency and offensiveness to the reasonable judgment of the courts below . . . "

In this connection, amicus finds itself at slight variance with the government's arguments. We submit that this Court's review is limited to the alternative stated, i.e., the sole question is whether the social importance of the conduct or subject matter is sufficient to take the case out of the realm of a jury issue. The historical role of a reviewing court in this area has heretofore been limited to a determination as to whether a jury issue has been presented. The fine line between "candor" and "shame" has always been a jury matter. *U. S.* v. *Kennerley,* 209 Fed. 119, 120; *U. S.* v. *Levine,* 83 F. 2 156, 157; *Roth* v. *U. S.,* 354 U.S. 476 at 490; *Kingsley Book Inc.* v. *Brown,* 354 U.S. 436 (Justice

Brennan, dissenting). We believe that this Court has, in fact, been following the mode of review noted, that is, limiting its plenary review of the case to the question of the redeeming importance of the conduct and subject matter involved. See Brief Amicus Curiae, pp. 46-51, 59.

Respectfully submitted,

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